No. 2864

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NG CHOY FONG,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Upon Error from the Southern Division of the United States District Court for the Northern District of California, First Division

JOHN W. PRESTON,
United States Attorney,

M. A. THOMAS,
Asst. United States Attorney,

Attorneys for Defendant in Error.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

NEAL PUBLISHING CO. PRINT, SAN FRANCISCO.

No. 2864.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NG CHOY FONG,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

INTRODUCTION.

The plaintiff in error was convicted of a violation of the Act of February 9, 1909, as amended January 17, 1914, for having on the 12th day of August, 1915, at San Francisco, California, concealed and facilitated the transportation and concealment of 660 five-tael cans of opium prepared for smoking purposes, which she then and there well knew had been imported into the United States contrary to law.

At the trial of the case before the District Court the jury was instructed, among other things, as follows:

> "The act under which this prosecution is had is as follows: 'That after the first day of April,

nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasurer is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.'

'Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or (and this is the portion with which we are here concerned) shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be punished,— as provided. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof such posession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.'

'Sec. 3. That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the

United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.'

These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the Government prove that the defendants had after July 1st, 1913, smoking opium in their possession, when the presumption at once arises that it had been imported after April 1st, 1909,—and such possession imputed to the defendants a guilty knowledge sufficient to warrant a conviction, unless the defendants shall explain such possession to your satisfaction. If therefore you are satisfied from the evidence beyond a reasonable doubt that defendants did have posesssion of this opium, and that it was smoking opium, then such posession would be sufficient to warrant a conviction, unless the defendants have explained such possession to your satisfaction.' "

Plaintiff in error assigns as error that part of the instruction, being sections 2 and 3 of the Act of February 9, 1909, as amended January 17, 1914, and that part of the instruction above quoted which immediately follows section 3 of the Act and is based on sections 2 and 3 of the Act. In other words, the plaintiff in error contends that sections 2 and 3 of the Act are unconstitutional and void as being violative of the fifth amendment to the Constitution of the United States in that they deprive the person accused of the due process of law guaranteed by the Constitution,

by depriving her of the presumption of innocence guaranteed by the Constitution of the United States and forcing her to become a witness in the case, whether she wishes to or not.

ARGUMENT.

Sections 2 and 3 of the Act of February 9, 1909, as amended, do not violate any of the guarantees contained in the fifth amendment to the Constitution of the United States.

The first section of the opium act absolutely forbids the importation of smoking opium into the United States after the first day of April, 1909. Sections 2 and 3 of the act were passed for the purpose of effectively enforcing the first section. The power to pass such laws as are necessary for the enforcement of other laws has long been recognized and was affirmed by the Supreme Court of the United States in the case of *Brolan, et al,* vs. *United States*, 236 U. S. 216, 59 Law Ed. 544, in which case the Supreme Court had under consideration section 2 of the act in question here.

The provisions of section 2 with regard to possession are identical with those of section 3082 R. S. That section has been enforced and its constitutionality has been assumed by the courts for over fifty years. If Congress could lawfully place such restriction on merely smuggled goods, it can equally legislate with regard to absolute contraband.

Section 3 of the act establishes a legal presumption that opium found in the United States after July 1, 1913, was imported after April 1, 1909. In fact, it goes little further than the actual presumption on that matter in view of the fact that the importation of opium had by that time been absolutely prohibited for a period of four years and three months. It is a matter of common knowledge that opium is not produced in the United States. The raw product comes almost exclusively from China (See Cong. Rec. Vol. 43, p. 1681 Et seq.; Message of President Taft upon the opium problem, 61st Cong., 2nd Sess. Senate Doc. 377.)

Similar legislation has been upheld by the courts. In *State* vs. *Patrick Higgins*, 13 Rhode Is. Rep. 330, the constitutionality of a statute was approved which provided that

> "Evidence of the sale or keeping of intoxicating liquors for sale in any building, place, or tenement, shall be prima facie evidence that the sale or keeping is illegal."

The Supreme Court of Rhode Island upheld the same provision of the statute against attacks charging unconstitutionality in the case of *State* vs. *Beswick*, 13 Rhode Is. Rep. p. 211, and *State* vs. *Mellor*, 13 Rhode Is. Rep., p. 666.

The Court of Appeals of New York in the case of *Board of Commissioners of Excise of the City of Auburn* vs. *Merchant*, 8 N. E. 484, upheld the constitutionality of a law which provides that

> "Whenever any person is seen to drink in such shop, or house, out house, yard, or garden belonging thereto, any spirituous liquors or wines forbidden to be drank therein, it shall be prima facie evidence that such spirituous liquors or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein."

In *Howard* vs. *Moot,* 64 N. Y. 261, quoted in the Merchant case, the court said:

> "The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are at all times subject to modification and control by the legislature. x x x It may be conceded for all the purposes of this appeal, that a law that should make evidence conclusive, which was not so necessarily in and of itself, and thus precluded the adverse party from showing the truth, would be void, as indirectly working a confiscation of property, or a destruction of vested rights. But such is not the effect of declaring any circumstance, or any evidence, however, slight, prima facie proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence."

139 NY 32; 34 NE 759

The case of *People* vs. *Cannon,* decided by the Court of Appeals of New York, on October 3, 1893, upheld the constitutionality of the provision of a statute which provided that posession by a dealer in second-hand articles of any registered stamped bottles, without the written consent of the owner of the stamp, shall be presumptive evidence of unlawful

use, purchase, and traffic therein, there being such connection between the possession and an unlawful traffic therein as to make it proper presumptive evidence of guilt.

A good discussion of the constitutionality of such enactments appears in the opinion of the court.

On this same point see also Wigmore on Evidence, Vol. 2, p. 1671 and notes, being a part of section 3 of paragraph 1354.

While the presumption of innocence accompanies the accused until the verdict and does not cease when the case is submitted to the jury, yet it has been held that in a prosecution for murder, the possession of articles apparently taken from the deceased raises a prima facie presumption of guilt to be rebutted or explained away by the accused.

Wilson vs. *U. S.* 162 U. S. 613, 40 Law Ed. 1090.

Furthermore, it has been repeatedly held that recent possession of stolen goods may raise a presumption of guilt in prosecutions for burglary, larceny and robbery.

12 *Cyc.* p. 385.

An examination of the cases cited by counsel for the plaintiff in error shows that for most part they are clearly distinguishable from the case here.

In *State* vs. *Beswick,* 13 Rhode Is. 211, the Court held to be unconstitutional that part of a statute which provided that the notorious character of prem-

ises, or of the persons frequenting the same, or the keeping of implements usually appertaining to places where liquors are sold shall be prima facie evidence that prohibited liquors are kept on such premises for the purpose of sale was unconstitutional.

But the same case, as I have hereinabove pointed out, supports the contention of the Government here with regard to another section of the same statute. The distinction between the two sections considered in that case, one of which was held to be unconstitutional and the other to be constitutional, is clear, as will appear on reading the entire decision.

People vs. *Lyon,* 34 N. Y. Sup. Ct. R. 180 (27 Hun.) is a decision of the Supreme Court rendered in 1882 and in my opinion is superseded by the case of *Commissioners etc. of Auburn* vs. *Merchant,* 8 N. E. 484, decided by the Court of Appeals in New York in 1886. This latter case upholds the constitutionality of the same provision which was declared to be unconstitutional in the Lyon case.

The case of *State* vs. *Divine,* 4 S. E. 477, cited by counsel for plaintiff in error, is distinguished from the case at bar on account of the fact that in the that case the statute provided that whenever any livestock shall be killed by the engine or cars on any railroad, and such killing is proved, it shall be prima facie evidence of negligence in any indictment therefor against the conductor or engineer of the train and certain named officers of the road, and further provided that such killing was a misdemeanor.

Divine was an officer of the railroad who was not present at the time of the killing at all and the Court held, and properly so, that the act was unconstitutional because it undertakes to declare a person guilty of an act without showing that he was connected with it in any way, upon mere proof that he is an officer of the road and that certain animals were killed by a train operated by that road.

The case of *Cummings* vs. *Missouri*, 71 U. S. 277, cited by counsel for plaintiff in error, involves a number of unreasonable restrictions placed upon certain classes of people and cannot be held as authority for the proposition contended for by plaintiff in error here.

Peck vs. *Cargill*, 167 N. Y. 391, 60 N. E. 775, cited by counsel for plaintiff in error at page 37 of his brief, is distinguished from the case at bar on account of the fact that the statute permitted any citizen to file a petition for the forfeiture of a liquor license and provided that the license should be revoked without any evidence whatever unless the holder of the license filed a verified answer, putting in issue a material fact relative to the charges made. In other words, the statute provided for the confiscation of property without evidence, unless the owner went on record with a verified denial.

The cases of *Boyd* vs. *United States*, 116 U. S. 616, 29 Law Ed. 746, and *United States* vs. *Bell*, 81 Fed. 830, cited by counsel, have regard to compulsory production of a man's private papers and the compelling

of him to testify in a case where he might incriminate himself, and the language of the Court in those cases cannot be said to apply to legal presumptions created by statutes which do not in themselves compel the attendance of a defendant as a witness or bring in his private papers.

Ex parte Wong Hane, 108 Cal. 680, 41 Pac. 693 and *ex parte Kameta*, 36 Oreg. 251, 60 Pac. 394 declare unconstitutional certain ordinances which provide that

> "It shall be unlawful for any person to have in his possession, unless it be shown that such possession is innocent or for a lawful purpose, any lottery ticket, etc."

It seems, however, that such a statute with regard to lottery tickets and the other articles mentioned in the statute places a greater burden on the defendant than is placed by sections 2 and 3 of the act in question here.

Section 3 provides in effect that after a period of four years and three months have elapsed from the date when smoking opium became absolute contraband with regard to importation into the United States, all opium found should be considered as contraband in the United States. It thereby makes opium a dangerous thing to handle and it is not inconsistent with the rights of one who desires to handle it thereafter to require by section 2 of the act that he show his right by explaining his possession after possession shall have been proved.

Furthermore, neither the California nor the Oregon Court refers to or reviews any authority whatever on the constitutionality of such legislation, but apparently the California decision comes out of a clear sky and is followed by Oregon.

In *Henderson Bridge Company* vs. *Henderson City*, (1899) 173 U. S. 592, 615, the Court said:

> "x x x An Act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute. x x x."

CONCLUSION.

The Counsel for defendant in error submits that section 2 of the opium act is constitutional and is justified by section 3082 of the Revised Statutes which has stood on the books unchallenged for fifty years.

Section 3 of the act does little more than place on the statute books the natural presumption which arises with regard to an article which for over four years has been declared contraband and which common experience has proven can easily be smuggled into the country. Neither sections require a defendant to take the stand in the strict sense of that word any more than does the legal presumption of long standing that recent possession of stolen goods raises a presumption of guilt, or that possession of articles belonging to a man who has been murdered found in the possession of the defendant raises a presumption of guilt with regard to him.

We respectfully submit that the instructions of the trial court were proper and that the statute in question is constitutional.

JOHN W. PRESTON,
United States Attorney

M. A. THOMAS,
Assistant United States Attorney,

Attorneys for Defendant in Error.